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IN THE

Supreme Court of the United States

October Term 1973

No. 73-908

ROBERT E. COTE,

Petitioner,

vs.

[redacted] THE NORTHERN [redacted] WORTH DIVISION, UNITED STATES

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

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IN THE

Supreme Court of the United States

October Term 1973
No. .....

ROBERT E. COTE,

Petitioner,

vs.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Petitioner, Robert E. Cote, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on October 11, 1973.

Opinions Below.

The judgment and opinion of the Court of Appeals appears in Appendix A hereto. Judgment and commitment of the United States District Court for the Northern District of Texas appears in Appendix B hereto.

Jurisdiction.

The judgment of the Court of Appeals for the Fifth Circuit was entered on October 11, 1973. A due and timely Petition for Rehearing was denied on November

9, 1973. A copy of the Order denying the Petition for Rehearing appears hereto as Appendix C. This Court's jurisdiction is invoked under 28 United States Code Section 1254(1).

Questions Presented Upon Second Petition for Writ of Certiorari.

I

WHETHER THE SUBJECT MATERIALS MAY BE FOUND TO BE OBSCENE PURSUANT TO THE *MILLER v. CALIFORNIA* CASE WHEN AS A MATTER OF LAW THE SUBJECT MATERIALS ARE NOT OBSCENE PURSUANT TO THE UNITED STATES SUPREME COURT CASE AUTHORITIES WHICH WERE CONTROLLING AT THE TIME THE CASE CAME BEFORE THE LOWER COURT FOR PRETRIAL MOTIONS AND TRIAL?

II

WHETHER THE APPELLANT IS ENTITLED TO THE BENEFIT OF THE LAW AS IT EXISTED AT THE TIME THE CASE CAME BEFORE THE LOWER COURT FOR PRETRIAL MOTIONS AND TRIAL?

III

WHETHER THE LOWER COURT MAY PROPERLY AND WITHIN THE CONCEPT OF DUE PROCESS DETERMINE THE OBSCENITY OR NONOBSCENITY OF THE SUBJECT MATERIALS WITHOUT THE BENEFIT OF ANY EVIDENCE RELATING TO CONTEMPORARY COMMUNITY STANDARDS, VALUE, OR APPEAL OF THE DOMINANT THEME?

Questions Presented Upon First Petition for Writ of Certiorari.

IV

WHETHER ASSIGNED ERROR TO THE DENIAL BY THE LOWER COURT OF A PRETRIAL MOTION IS A PREDICATE UPON WHICH APPELLANT MAY RAISE ISSUE AT TIME OF APPEAL AFTER JUDGMENT WHERE PRIOR TO TIME OF TRIAL THE ORDER ON THE PRETRIAL MOTION IS INTERLOCUTORY IN NATURE AND DOES NOT BECOME FINAL UNTIL JUDGMENT AFTER TRIAL?

V

WHETHER A LOWER COURT MAY PROPERLY PROCEED TO TRIAL UPON A CHARGE BY INDICTMENT WHEN UPON A PRETRIAL MOTION TO DISMISS IT IS DEMONSTRATED CLEARLY AND AS A MATTER OF LAW TO THE LOWER COURT THAT THE LOWER COURT DOES NOT HAVE JURISDICTION SO TO PROCEED?

VI

WHETHER A LOWER COURT MAY PROPERLY TAKE A PLEA OF GUILTY TO A CHARGE UNDER SECTION 1461 OF TITLE 18 OF THE UNITED STATES CODE WHERE PRIOR THERETO IT IS CLEARLY DEMONSTRATED TO THE LOWER COURT THAT THE SUBJECT MATERIALS ARE AS A MATTER OF LAW NOT OBSCENE?

VII

WHETHER A PLEA OF GUILTY TO A FOUR (4) COUNT INDICTMENT CHARGING ONLY VIOLATION OF SECTION 1461, TITLE 18 OF THE UNITED STATES CODE, FORECLOSES REVIEW UPON APPEAL OF THE QUESTION WHETHER AS A MATTER OF LAW THE MATERIALS SUBJECT OF THE INDICTMENT ARE NOT OBSCENE WHERE PRIOR TO SUCH PLEA THE APPELLANT HAS, AT A PRETRIAL MOTION TO DISMISS, AND UPON THE RECORD DEMONSTRATED TO THE LOWER COURT THAT SUCH MATERIALS ARE NOT OBSCENE AS A MATTER OF LAW AND WHERE APPELLANT HAS PRIOR TO SUCH PLEA ANNOUNCED HIS INTENT TO RAISE SUCH QUESTION UPON APPEAL AND MOVED THE LOWER COURT TO RECEIVE INTO EVIDENCE FOR SUCH APPEAL THE SUBJECT MATERIALS, AND COMPARABLE MATERIALS HELD BY THE UNITED STATES SUPREME COURT TO BE NOT OBSCENE AS A MATTER OF LAW?

VIII

WHETHER APPELLANT SHOULD BE INCARCERATED FOR A PERIOD OF TWO (2) YEARS UPON A PLEA OF GUILTY TO A FOUR (4) COUNT INDICTMENT CHARGING ONLY VIOLATION OF SECTION 1461, TITLE 18 OF THE UNITED STATES CODE, WHERE AS A MATTER OF LAW NO CRIME HAS BEEN COMMITTED AND SUCH IS CLEARLY DEMONSTRABLE UPON THE RECORD AND UPON REVIEW OF THE EVIDENCE RECEIVED BY THE LOWER COURT?

IX

WHETHER, CONSISTENT WITH FREEDOMS SET FORTH IN THE FIRST AMENDMENT AND THE CONSTITUTIONAL STANDARDS FOR JUDGING OBSCENITY ENUNCIATED BY THE SUPREME COURT, THE MATERIALS, SUBJECT MATTER OF THE INDICTMENT HEREIN, ARE OBSCENE AND THEREFORE, NOT PROTECTED BY THE FIRST AMENDMENT, WHERE MATERIALS OF A SIMILAR CHARACTER AND CONTENT HAVE BEEN HELD BY THE UNITED STATES SUPREME COURT AND OTHER FEDERAL AND STATE COURTS TO BE CONSTITUTIONALLY PROTECTED AND NOT OBSCENE AS A MATTER OF LAW?

AND COROLLARY TO THIS QUESTION WHETHER ANY MATERIALS WHICH FALL SHORT OF AND ARE NOT CANDID GRAPHIC DESCRIPTIONS OF SEXUAL INTERCOURSE OR SEXUAL PERVERSIONS ARE CAPABLE OF BEING DENOMINATED AND FOUND TO BE LEGALLY OBSCENE?

X

WHETHER UPON THE FACE THEREOF AND/OR AS APPLIED IN THIS CASE SECTION 1461 OF TITLE 18 OF THE UNITED STATES CODE IS IN VIOLATION OF PETITIONER'S RIGHTS AS ENUNCIATED UNDER THE FIRST AND FIFTH AMENDMENTS TO THE UNITED STATES CONSTITUTION?

Constitutional and Statutory Provisions Involved.

The pertinent provisions of the First and Fifth Amendments to the Constitution of the United States, and the pertinent provisions of Section 1461 of Title 18 of the United States Code, at the time the alleged offense was committed, appear hereto as Appendix F.

Statement of the Case.

By Indictment of the Federal Grand Jury for the Northern District of Texas filed December 16, 1970, Petitioner, Robert E. Cote, was charged with four counts, each alleging only violation of Section 1461, Title 18 of the United States Code and therein specifically setting forth the subject matter of said Indictment to be certain magazines entitled "Ups and Downs No. 4", "Duplex", and "Gemini", a certain motion picture film entitled "Tri-Sex", and those certain advertisements thereabout. In essence, the Indictment charged that such material was in and of itself obscene.

Over the Claims of the Petitioner that the subject material was not obscene and entitled to constitutional protection under the Federal Constitution and in the light of the interpretative decisions of this Court at that time and further over the claims of Petitioner that application of Section 1461 of Title 18 of the United States Code was unconstitutional in this case, Petitioner was arraigned and entered a plea of not guilty to each count of the Indictment. The case was then set for trial in the latter part of June, 1971, but trial was thereafter continued to February 1, 1972.

On January 12, 1972 Petitioner filed with the Lower Court a pretrial Motion to dismiss the Indictment, points and authorities thereabout, argument, declara-

tions, and comparable materials, all at that time held by the United States Supreme Court to be not obscene as a matter of law, supporting such pre-trial Motion. (Please see pp. 26 to 113 and 168 to 241 of the Appendix in the United States Court of Appeals for the Fifth Circuit, No. 72-2417, United States of America v. Robert E. Cote for the full text thereof.) Among the contentions argued by the Petitioner in such Motion the Petitioner once again urged his claims:

(A) That the only variety of expression dealing with sexual subjects which is not protected speech is "hardcore" pornography;

(B) That the material here involved, considered in and of itself, is not constitutionally obscene, or "hardcore" pornography;

(C) That the determination of the nonobscenity of the subject material is a matter of law which may be ruled upon before trial by the Lower Court.

Petitioner submitted to the Lower Court, and the Lower Court received the following materials as comparable materials all of which had been held by the United States Supreme Court to be not obscene as a matter of law.

Exhibit "A"—a motion picture film entitled "Bac-8" held by the United States Supreme Court to be not obscene in *California v. Pinkus,* 400 U.S. 922 (November 23, 1970) (#508).

Exhibit "B"—a magazine entitled "Togetherness" held by the United States Supreme Court to be not obscene in *Burgin v. South Carolina,* 404 U.S. 806 (October 12, 1971) (#70-122).

Exhibit "C"—a declaration Re Content of Motion Picture Films held by the United States Supreme Court to be not obscene in *Wiener v. California,* 404 U.S. 988 (December 14, 1971) (#71-443).

Exhibit "D"—a magazine entitled "My-O-My No. II" held by the United States Supreme Court to be not obscene in *Wiener v. California,* 404 U.S. 988 (December 14, 1971) (#71-443).

Exhibit "E"—a magazine entitled "Hello" held by the United States Supreme Court to be not obscene in *Wiener v. California,* 404 U.S. 988 (December 14, 1971) (#71-443).

Exhibit "F"—a magazine entitled "Psychedelic" held by the United States Supreme Court to be not obscene in *Wiener v. California,* 404 U.S. 988 (December 14, 1971) (#71-443).

Exhibit "G"—a magazine entitled "Ballers #1" held by the United States Supreme Court to be not obscene in *Wiener v. California,* 404 U.S. 988 (December 14, 1971) (#71-443).

Exhibit "H"—a magazine entitled "Wild 'n' Sassy" held by the United States Supreme Court to be not obscene in *Wiener v. California,* 404 U.S. 988 (December 14, 1971) (#71-443).

Petitioner and the Government below stipulated that the above stated comparable materials were true and correct copies of the materials held to be not obscene by the United States Supreme Court in the cases above cited.

On February 1, 1972 after argument upon the Motion, the Lower Court took this motion under submission.

Thereafter on March 3, 1972, the Lower Court denied the pre-trial Motion to Dismiss and entered its order accordingly (Appendix D hereto). On March 10, 1972, Petitioner filed Request for Findings, but the Lower Court did not reply to said Request and no Findings were ever prepared or filed pursuant to such Request.

On May 10, 1972, Petitioner filed a Petition for Writ of Mandamus and a separate Petition for Writ of Prohibition with the United States Court of Appeals for the Fifth Circuit under No. 72-1987 pressing forward the Constitutional issues urged at the pre-trial Motion to Dismiss and attacking the Lower Court's inaction on the Request for Findings relating to the pre-trial Motion to Dismiss.

On May 12, 1972, the United States Court of Appeals for the Fifth Circuit denied both Petitions (Appendix E hereto).

Thereafter on May 15, 1972, Petitioner was re-arraigned, withdrew his earlier plea of not guilty and entered a plea of guilty. At the time of such new plea, Petitioner moved the Lower Court to mark and receive into evidence the disputed matter in this case and all comparable materials submitted to the Court relating to the Pre-trial Motion to Dismiss. The Lower Court upon such motion did mark and receive into evidence all such materials. On the record, Petitioner again announced his intent to appeal upon the question "Whether the disputed materials are as a matter of law

not obscene", and reserved to himself the right to raise related Constitutional questions. Petitioner then applied for probation and the matter was set for June 9, 1972 for judgment and sentence.

Judgment and Commitment were filed on June 9, 1972 (Appendix B hereto). The Lower Court adjudged that the Petitioner was guilty as charged and convicted and that the Petitioner be committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of two (2) years on Count 1, two (2) years on Count 2, two (2) years on Count 3, and two (3) years on Count 4, said sentence to run concurrently.

The Petitioner duly appealed from the judgment of the Lower Court to the United States Court of Appeals for the Fifth Circuit, contending, among other things, that the disputed materials were, as a matter of law, not obscene but, on the contrary, entitled to constitutional protection under principles at that time enunciated by this Court and that therefore the Lower Court was in error in denying the pre-trial Motion to Dismiss.

On December 6, 1972, the United States Court of Appeals for the Fifth Circuit rendered an opinion and judgment affirming the judgment of the Lower Court. A due and timely Petition for Rehearing was then filed by Petitioner in the United States Court of Appeals for the Fifth Circuit. On January 15, 1973, the Petition for Rehearing was denied and the mandate stayed to

February 14, 1973 pursuant to Rule 41 of the Federal Rules of Appellate Procedure.

Thereafter Petition for Writ of Certiorari was filed and the same was docketed in this Honorable Court on February 13, 1973 as No. 72-1120. On June 25, 1973 the Petition for Writ of Certiorari was granted by this Honorable Court, the Judgment vacated, and the case remanded for further consideration in light of: "*Miller v. California,* ..... U.S. ..... (1973); *Paris Adult Theatre I v. Slaton,* .... U.S. .... (1973); *Kaplan v. California,* ..... U.S. ..... (1973); *U.S. v. 12 200-ft. Reels of Super 8 mm. Film,* ..... U.S. ..... (1973); *U.S. v. Orito,* ..... U.S. ..... (1973); *Heller v. N.Y.,* ..... U.S. ..... (1973); *Roaden v. Ky.,* ..... U.S. ..... (1973); and *Alexander v. Virginia,* ..... U.S. ..... (1973)," the most recent obscenity cases then decided by this Honorable Court.

Thereafter on October 11, 1973, the United States Court of Appeals for the Fifth Circuit once again affirmed the Lower Court's judgment. Copy of that Honorable Court's opinion is attached hereto as Appendix "A". A due and timely Petition for Rehearing was then filed by Petitioner in the United States Court of Appeals for the Fifth Circuit on or about October 29, 1973. On October 11, 1973 the Petition for Rehearing was denied (Appendix "C" hereto) and the mandate stayed to December 9, 1973 pursuant to Rule 41 of the Federal Rules of Appellate Procedure.

DESCRIPTION OF MATERIALS INVOLVED

1. A magazine entitled "Ups and Downs No. 4";
2. A magazine entitled "Duplex";
3. A magazine entitled "Gemini";
4. A motion picture film entitled "Tri-Sex"; and
5. Advertising material thereabout.[1]

None of the materials subject of the within case contains the kind of graphic and vivid descriptions of sexual intercourse and/or sexual perversion which prior to *Miller* were considered to be "hardcore pornography". Rather, all of the above described materials fall far short of such graphic candor of description.

All of the materials described above contain a great deal of depiction of nude human beings of both sexes in various poses and juxtaposition to one another, but none contain candid, vivid, graphic depictions of sexual intercourse or sexual perversion.

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[1]Petitioner will request the Clerk of the Court of Appeals to certify and transmit all Exhibits to this Honorable Court.

REASONS FOR GRANTING THE WRIT.

Petitioner respectfully suggests to this Honorable Court that Certiorari should be granted pursuant to those reasons hereinafter set forth.

1. All of the disputed materials in this case (a magazine entitled "Duplex", a magazine entitled "Gemini", a magazine entitled "Ups and Downs No. 4", a motion picture film entitled "Tri-Sex", and the advertising material thereabout) are not obscene as a matter of law, are not "hardcore pornography" and are therefore constitutionally protected by the First Amendment to the United States Constitution. This contention is predicated upon the fact that at the time of the pretrial motion and at the time of trial controlling case authorities from this Honorable Court indicated that the disputed materials were protected.

Since the landmark decision in *Roth v. United States,* 354 U.S. 476, 488, 77 S.Ct. 1304, 1311 (1957), myriad decisions had been rendered by various courts interpreting the doctrine contained therein.

All of the myriad decisions culminated in a short *per curiam* decision of this Honorable Court in *Redrup v. State of New York,* 87 S.Ct. 1414, 386 U.S. 770 (1967). In the *Redrup* case, *supra,* the Court then summarized the positions of each of the individual Supreme Court justices and, *inter alia,* stated that obscenity consisted of the following:

> ". . . a state may not constitutionally inhibit the distribution of literary material as obscene unless (a) the dominant theme of the materials taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community stand-

> ards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value, emphasizing that the 'three elements must coalesce', and that no such material can be "proscribed unless it is found to be utterly without redeeming social value'."

At page 1415, the Court stated clearly and differentiated other cases it was deciding by stating that there were certain elements in the cases that were entirely lacking which to their minds might have changed the results. These elements were stated as follows:

> ". . . in none of the cases was there a claim that the statute in question reflected a specific or limited state concern for juveniles . . . in none was there any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it . . . and in none was there evidence of the sort of 'pandering' which the court found significant in *Ginzburg v. United States*, 383 U.S. 463, 86 S.Ct. 942, 16 L.Ed. 2d 31."

It was generally conceded and understood following the *Redrup* decision, *supra*, that the United States Supreme Court had stated clearly that only "hardcore" pornography could be constitutionally proscribed, unless the three other elements stated above were present, which elements were stated as above quoted at page 1415, being (1) a concern for juveniles, (2) an invasion of individual privacy of unwilling adults and (3) pandering.

The Court then confirmed this position historically by granting certiorari and reversing summarily in a number of cases.

Petitioner respectfully urges this Honorable Court to note its similar determinations in the following cases:

Prior to

Redrup v. New York (1967);
Times Films v. Chicago, 355 U.S. 35;
One, Inc. v. Olesen, 355 U.S. 371;
Sunshine Book Co. v. Summerfield, 355 U.S. 372;
Tralins v. Gerstein, 378 U.S. 576;
Grove Press v. Gerstein, 378 U.S. 577.

Decided with *Redrup:*

Austin v. Kentucky, 386 U.S. 767;
Gent v. Arkansas, 386 U.S. 767.

Decided on June 12, 1967 (citing *Redrup*):

Keney v. New York, 388 U.S. 440;
Friedman v. New York, 388 U.S. 441;
Ratner v. California, 388 U.S. 442;
Cobert v. New York, 388 U.S. 443;
Shepard v. New York, 388 U.S. 444;
Avansino v. New York, 388 U.S. 446;
Aday v. United States, 388 U.S. 447;
Corinth Pub. v. Westberry, 388 U.S. 448;
Books, Inc. v. United States, 388 U.S. 449;
Schackman v. California, 388 U.S. 454;
Quantity of Books v. Kansas, 388 U.S. 452;
Mazes v. Ohio, 388 U.S. 453;
Rosenbloom v. Virginia, 388 U.S. 450 (citing *Sunshine Book Co. v. Summerfield, supra*, 355 U.S. 372, rather than *Redrup*).

Decided on October 23, 1967 (citing *Redrup*):

Potomac News v. United States, 389 U.S. 47;
Connor v. City of Hammond, 389 U.S. 48;
Central Magazine Sales v. United States, 389 U.S. 50;
Chance v. California, 389 U.S. 89.

Decided in 1968 (citing *Redrup*):

I.M. Amusement Corp. v. Ohio, 389 U.S. 573;
Robert-Arthur Management Corp. v. Tennessee, 389 U.S. 578;
Felton v. Pensacola, 390 U.S. 340;
Henry v. Louisiana, 392 U.S. 655.

Decided at the 1969 Term of Court (1969-1970) (citing *Redrup*):

Carlos v. New York, 396 U.S. 119;
Cain v. Kentucky, 397 U.S. 319;
Bloss v. Dykema, 398 U.S. 278;
Walker v. Ohio, 398 U.S. 434;
Hoyt v. Minnesota, 399 U.S. 524.

That this had then been the general understanding of the legal community is made clear by a quotation from the case of *Luros v. United States* (1968, 8 CCA) 389 F.2d 200, wherein that Court states as follows at page 205:

> "In *Redrup v. State of New York*, 386 U.S. 767, there is specific indication that a majority of the Supreme Court adopts standards 'not dissimilar' to banning only 'hard-core' pornography. Subsequent application of Redrup gives no contra-indication."

In the case now before the court there was no charge that the individual privacy of an unwilling adult had

been invaded, nor had there been charged that the material had been mailed to juveniles, nor had pandering been charged. It is respectfully submitted that, in reviewing the disputed materials, pandering may not have properly been charged. Visual examination of the disputed materials will quickly reveal that they each and all are comparable substantially to other materials then held as a matter of law to be not obscene. The questionable materials are not hardcore pornography, nor are they, or any one of them, even close.

Pandering then may have been relevant in only "close" cases and in no others.

> "We perceive no threat to First Amendment guarantees in thus holding that in *close* cases evidence of pandering may be probative with respect to the nature of the material in question and thus satisfy the *Roth* test." (emphasis ours) (*Ginzburg v. United States*, 383 U.S. 463 at p. 474 (1965).)

Note also the opinion of the Honorable Judge Robert C. Zampano in the case *United States v. Levy* decided on April 14, 1972 in the Federal District Court of Connecticut holding that the doctrine of pandering cannot apply unless there be a *"close case"* (emphasis ours).

Petitioner respectfully requests this Honorable Court to see also: *United States v. One Carton Positive Motion Picture Film Entitled "491"*, 367 F.2d 889, 896 (.... Cir. 1966) (motion picture film containing "a series of sexual acts (1) sodomy (buggery); (2) intercourse with a prostitute; (3) a homosexual act; (4) intercourse between the prostitute and a dog; and (5) of self-mutilation", held not obscene); *Culbertson*

v. California, 385 F.2d 209 (9 Cir. 1967) (photographs); *Luros v. United States,* 389 F.2d 200 (8 Cir. 1968) (nudist magazines); *United States v. A Motion Picure Film Entitled "I Am Curious—Yellow"*, 404 F.2d 196, 198-199 (2 Cir. 1968) (motion picture film with scenes which "depict sexual intercourse . . . (and) . . . oral-genital activity" does not appeal to prurient interest); *United States v. 35 MM. Motion Picture Film Entitled "Language of Love"*, 432 F.2d 705 (2 Cir. 1970) (motion picture film containing scenes of explicit sexual activity does not appeal to prurient interest); *Spinar and German v. United States,* 440 F.2d 1241 (8 Cir. 1971) (nude male posters).

In light of the foregoing rulings, with the constant admonition by the Court that sex and obscenity are not synonymous and that the free speech and press provisions of the First and Fourteenth Amendments protect expression in the area of sex and sex relations, it is submitted that the disputed materials herein are clearly not obscene and are entitled to constitutional protection under the authority of this Honorable Court prior to *Miller*. Measured by any standard then formulated by members of the Court, it is plain that the disputed materials are well within contemporary community standards in the depiction and representation of sex and nudity and that the dominant theme of the materials taken as a whole, does not appeal to the prurient interest of the average person in the community as was the test prior to *Miller*.

Petitioner respectfully requests this Honorable Court to review each and all of the Defense Exhibits herein, materials then held to be not obscene and constitutionally protected in the cases hereinabove cited.

Petitioner then respectfully requests this Honorable Court to compare these materials and descriptions with the materials in the instant case, Government Exhibits, subject of the indictment herein. For,

> ". . . having in mind the alternative of jail or freedom, courts must be aware of the facts of the 'held-not-to-be-obscene' or 'approved' cases and insure that the proof is sufficient to allow a fact finder to set this case apart from them." *United States v. Klaw*, 350 F.2d 155, 170 (2nd Cir. 1965).

Petitioner is confident that after such review this Honorable Court will determine that the materials in issue fall far within the constitutionally protected limits of expression and are not obscene as a matter of law pursuant to the authority of this Honorable Court prior to *Miller*.

2. Since the disputed materials in this case are not obscene as a matter of law pursuant to pre-*Miller* authority, then it is respectfully submitted that the Petitioner is entitled to the benefit of such pre-*Miller* authority and the case should have been ordered dismissed by the Lower Court when this case was remanded on June 25, 1973. In a case entitled *United States of America v. Michael J. Thevis*, No. 71-2614 decided in the United States Court of Appeals for the Fifth Circuit on September 12, 1973, the Court remarked on page 12 of its Opinion "That any Count based on a magazine which is not obscene under both of these standards is due to be dismissed". The Court there was referring to both the *Miller* and *Memoirs* definitions of obscenity. Most certainly under the *Memoirs* definition the disputed materials in this case are not obscene. Further support is given to this con-

tention by the authorities hereinabove cited. It would appear therefore since the disputed materials in this case are not obscene as a matter of law pursuant to pre-*Miller* authority, the opinions of the United States Court of Appeals for the Fifth Circuit in the *Thevis* case and in this case are inconsistent. Petitioner herein respectfully contends that he is entitled to the benefit of pre-*Miller* authority and suggests therefore that this Petition for Writ of Certiorari should be granted to vindicate his contention and to clarify inconsistencies in the opinions of the United States Court of Appeals for the Fifth Circuit.

3. Prior to trial Petitioner raised issue relating to the nonobscenity as a matter of law of the disputed materials and thereupon attacked the Lower Court's jurisdiction moving the Lower Court to dismiss the Indictment. The Lower Court denied this pretrial motion.

Section 1291 of Title 28 of the United States Code in part provides:

> "The Court of Appeals shall have jurisdiction of appeal from all final decisions of the District Court of the United States . . ." (28 U.S.C.A. 918 (1945).

The denial of the Pre-Trial Motion to Dismiss is not however a final decision but is interlocutory in nature and therefore nonappealable.

> ". . . denial of a motion to dismiss, even when the motion is based upon jurisdictional grounds, is not immediately reviewable". *Catlin v. United States*, 324 U.S. 229, 236, 89 L.Ed. 911, 917-918 (1945)

"Orders in an incidental ancillary proceeding to a criminal action are interlocutory and non-appealable." *United States v. Koenig*, 290 F.2d 166, 169 (1961).

A plea of guilty, it is respectfully submitted, may be properly equated to finality since all that then remains is pronouncement of sentence.

Petitioner seeks review by this Petition of the Trial Court's ruling on the pretrial motion. It is respectfully submitted that the Court of Appeals in its opinion did not answer the issues relating hereto as otherwise raised in Petitioner's Opening Brief and as noted in Petitioner's Petition for Rehearing.

If the Petition for Writ of Certiorari herein requested is not granted there will have been no review of the issues raised relating to the jurisdiction of the trial Court to proceed and the deficiency of a factual basis upon which the trial Court may properly have accepted a plea.

4. On June 25, 1973 this Honorable Court vacated the Lower Court's judgment and remanded this case to the Lower Court for further consideration in light of the *Miller* case and other cases then decided by this Honorable Court. The Lower Court in its Opinion stated that it had made an independent constitutional judgment on the facts of this case as to whether the materials were constitutionally protected. However, Petitioner respectfully suggests to this Honorable Court that there was no evidence whatsoever relating to the dominant theme of the materials, community standards, and value upon which the Lower Court could make a proper judgment. If in fact the Lower Court were to make a constitutional judgment, the constitu-

tional judgment must necessarily in propriety and within the limits of due process be predicated upon pre-*Miller* authority and pre-*Miller* tests. Such pre-*Miller* authority and such pre-*Miller* tests would support Petitioner's contention that the disputed materials are not obscene as a matter of law. This contention is further buttressed by comparing the disputed materials with other materials, exhibits herein, then held by this Honorable Court to be not obscene as a matter of law.

For that reason Petitioner respectfully suggests to this Honorable Court that Certiorari should be granted pursuant to the then announced duty of this Honorable Court to review all decisions wherein the substantial question of free expression under the First Amendment of the United States Constitution is presented.

Petitioner relies on this Court's then announced position with regard to the singular importance of ceaseless vigilance to safeguard and uphold the constitutional guarantee of free expression under the First Amendment of the United States Constitution, *Roth v. United States*, 354 U.S. 476, 488, 77 S.Ct. 1304, 1311.

As this Court stated in *Jacobellis v. Ohio*, 378 U.S. 184, 188, 84 S.Ct. 1676, 1678:

> "Such an abnegation of judicial supervision in this field would be inconsistent with our duty to uphold the constitutional guarantees. Since it is only 'obscenity' that is excluded from the constitutional protection, the question whether a particular work is obscene necessarily implicates an issue of constitutional law. See *Roth v. United States*, supra, 354 U.S., at 497-498, S.Ct., at 1315-1316 (separate opinion). Such an issue, we think, must ultimately be decided by this court. Our duty ad-

> mits of no 'substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case.' Id. 354 U.S., at 498, 77 S.Ct., at 1316, see *Manual Enteprises, Inc. v. Day*, 370 U.S. 478, 82 S.Ct. 1432, 1437, 8 L.Ed.2d 639 (opinion of Harland, J.)."

And at page 1679, the Court stated:

> "Hence we reaffirm the principle that, in obscenity cases as in all others involving rights derived from the First Amendment guarantees of free expression, this Court cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected."

This Court had held that expression in the form of motion picture films is also within the ambit of the First Amendment guarantees of free expression, *Jacobellis v. State of Ohio, supra.*

Petitioner most respectfully contends that these paramount and precious rights so derived should never be left with a local court their final arbiter. Prior to pre-*Miller* law this Honorable Court became the final arbiter upon matters relating to First Amendment freedoms. These First Amendment rights demanded then and still demand a constitutional judgment of the most sensitive type which must, when required, always be finally adjudicated by the United States Supreme Court.

The Court of Appeals, in holding that Petitioner's contention that the disputed material is not obscene as a matter of law was without merit, appeared to base its determination solely upon *United States v. Fragus*, 422 F.2d 1211 (5th Cir. 1970).

There was upon the first appeal to the Lower Court no review of the disputed materials by the Court of Appeals. Petitioner, however, respectfully suggests that the Court of Appeals failed to distinguish the *Fragus* case with the case then before it. In the *Fragus* case there was merely a plea of guilty by the accused. Thereafter Fragus sought by appeal to vacate his plea upon the ground that an arrest upon a charge of violation of Section 1462, Title 18 of the United States Code may not properly be made without a prior judicial determination of the obscenity of the disputed material and for that reason a plea of guilty may not stand. The Court of Appeals rejected the contention of Fragus and specifically noted in its supplemented opinion at page 1212 the following:

> "We further note from the record that the trial counsel personally retained by Fragus made not the slightest effort to let the light of day fall on this material so as to demonstrate for all to see that his client's guilty plea admission and the trial judge's evaluation that the material was utterly without any redeeming social worth, were wrong." (*United States v. Fragus*, 428 F.2d 1211, at p. 1212 (1970)).

Petitioner in the case before this Court undertook every reasonable effort prior to trial to persuade the Honorable trial judge that the disputed materials are not obscene as a matter of law. In Petitioner's reply brief to the Opening Brief of the United States at pages 15 to 22 Petitioner set forth such efforts:

(a) Prior to arraignment on February 27, 1971 before the Honorable Leo Brewster Petitioner raised constitutional objections to the Indictment and to Section 1461 upon the First and

Fifth Amendments and urged that the disputed materials were constitutionally protected. These objections by Petitioner were overruled.

(b) Thereafter Petitioner filed a written Pretrial Motion to Dismiss the Indictment essentially attacking the trial Court's jurisdiction by asserting that the disputed materials are not obscene as a matter of law. To support such assertion Petitioner submitted comparable materials held to be not obscene as a matter of law by the United States Supreme Court and filed a written brief in argument with points and authorities. On February 1, 1972 Petitioner orally argued the pretrial motion and offered to submit to the Honorable Leo Brewster comparable materials in addition to those already submitted. The trial judge, however, declined the offer saying that he did not believe it necessary. After such argument the trial judge took the matter under submission. On March 3, 1972 the pretrial motion was denied without findings and/or opinion even though findings were requested.

(c) Thereafter Petitioner, maintaining his contention that the disputed materials are not obscene as a matter of law, filed with the Court of Appeals a Petition for Writ of Mandamus and a separate Petition for Writ of Prohibition in an attempt to compel findings. Both Petitions were denied.

(d) On May 15, 1972 Petitioner again appearing before the trial judge, the Honorable Leo Brewster, asserted his position that the disputed materials are not obscene as a matter of law, re-

served to himself the right to raise the question of nonobscenity as a matter of law upon appeal, moved the Court to mark and receive into evidence all comparable materials and all disputed materials for further review by the Court of Appeals, then withdrew his earlier plea of not guilty and entered a plea of guilty.

Petitioner respectfully urges this Honorable Court to consider the parallel procedural aspects in *Haynes v. United States,* 390 U.S. 85, 19 L.Ed.2d at 923 (1968). There the accused was charged with violating 26 U.S.C. 5851. Prior to trial the accused moved the Lower Court to dismiss the charge asserting that Section 5851 violated his privilege against self-incrimination guranteed by the Fifth Amendment. The pretrial motion was denied. The accused withdrew his plea of not guilty, entered a plea of guilty and appealed his conviction to the Court of Appeals. The conviction was affirmed by the Court of Appeals for the Fifth Circuit (372 F.2d 651). This Honorable Court granted certiorari to examine the constitutionality of the conviction (388 U.S. 908). Upon review this Honorable Court found that the accused had seasonably and consistently asserted his claim, that the claim had not been properly assessed by the Lower Court and therefore under 28 U.S.C. Section 2106 reversed the judgment of the Court of Appeals without the requirement that there be any further proceedings in the Lower Court.

Here the Petitioner has likewise from the time of charge consistently asserted his claim that the disputed materials are not obscene as a matter of law. Petitioner had recognized prior to plea what had then appeared to be a useless task in undertaking a costly and time con-

suming trial defense where the identical issues therein would have been the identical issues raised upon the pretrial motion. Petitioner then attempted finally to preserve the record upon appeal in this matter by announcing his intent to appeal, the grounds thereabout, and by having made a part of the record all exhibits.

Petitioner under pre-*Miller* law attempted to follow the procedural aspects *Haynes* case and therefore under pre-*Miller* law would be entitled to all of the benefits of the *Haynes* authority.

Further Petitioner respectfully suggests that the Lower Court in any event to find the disputed materials to be obscene under *Miller* authority must necessarily look to evidence relating to the three-pronged test, none of which evidence was before the Lower Court at the time it reached its re-affirming decision on October 11, 1973. The Lower Court had even remarked upon page 3 of its opinion "If the test results of each of these articles were put into tabular form as was done in *Thevis* every answer to every question would be yes". The question becomes therefore how could the Lower Court properly reach such an affirmative answer without any evidence before it. In the *Thevis* case the trial court appeared to have some evidence upon the three-pronged test under *Memoirs*. In this case the trial court did not have such evidence, therefore this case is distinguished from the *Thevis* case upon the procedural aspect of the *Haynes* case as the Petitioner herein relied upon controlling case authority in effect at the time of the pre-trial motions herein and at the time of the trial herein and had further relied upon comparable materials which had been held at that time by this Honorable Court to be not obscene as a matter of law.

The opinion of the United States Court of Appeals for the Fifth Circuit in the *Thevis* case is appended hereto as Appendix G.

Petitioner therefore respectfully requests this Honorable Court to grant certiorari herein.

5. Petitioner also respectfully urges upon this Honorable Court that the Federal statute herein questioned, in the event the disputed materials are to be tested hereunder pursuant to the *Miller* Rule, must be held to be unconstitutional because the test language of the statute becomes vague, ambiguous and essentially meaningless, *United States v. Henson*, U.S.C.A. 9th, 73-2063, October 5, 1973.

Under *Miller*, prior definitions of obscenity have been in part repudiated and certain elements of the previously existing test applied by the Lower Court in this case have become therefore meaningless. First, the test relating to value that had been applied by pre-*Miller* law appears to have been changed by *Miller* law. Secondly, the test relating to community standards applied prior to pre-*Miller* law also appears to have been changed by *Miller* law.

Therefore Petitioner may not properly be convicted under the applicable statute since the applicable statute was essentially different under pre-*Miller* law. There is no way that Petitioner could have known on the date of the pre-trial motion or on the date of trial what this Honorable Court would have decided at the time of the *Miller* case on June 25, 1973.

Further Petitioner contends that the applicable statute in any event and without the benefit of *Miller* was unconstitutional at the time of the pre-trial motion herein and at the time of trial herein.

Petitioner now quotes verbatim from his Point No. 4 raised in his first Petition for Writ of Certiorari and sets forth the grounds upon which Petitioner contends that the applicable statute even under pre-*Miller* law was unconstitutional.

"In its opinion the Court of Appeals appears to have rejected summarily Petitioner's attack upon the validity of the statute upon which the indictment is based. Here, however, the substantial question presented has not in fact been answered. That question simply stated is whether the statute has been properly applied in this case where the disputed materials are not obscene as a matter of law.

"If it be correct as submitted by Petitioner, that obscenity is limited to that certain material which depicts and describes candidly and graphically sexual intercourse, oral copulation, or sexual perversions, then it is respectfully submitted that the materials, subject matter of this indictment, those certain magazines entitled 'Ups and Downs No. 4', 'Duplex', and 'Gemini', that certain motion picture film entitled 'Tri-Sex', and the advertisements thereabout, fall so far short of such materials that they are as a matter of law not obscene and therefore constitutionally protected. It is further suggested that the subject materials do not even come close to such a definition. An examination of the subject materials would at once support this statement. If, therefore, this be the definition practically of obscene matter, then most certainly Petitioner by such examination of the materials could determine whether or not the materials were obscene or not obscene and would be in a position understandingly to follow the law. It is respectfully submitted that Petitioner did examine the materials and did in fact believe they were not obscene

as a matter of law. Acting pursuant to such belief and understanding and exercising his best efforts to follow the law and the Court decisions defining obscenity, Petitioner did as acknowledged mail the materials set forth in the Indictment. Those materials, it is urged, are far milder and less explicit than the materials received into evidence as exhibits for the Defense and marked as follows:

Exhibit A—Motion Picture Film 'Bac 8'—*California v. Pinkus*, 400 U.S. 922 (November 23, 1970) (#508).

Exhibit B—Magazine 'Togetherness'—*Burgin v. South Carolina*, 404 U.S. 806 (October 12, 1971) (#70-122).

Exhibit C—Declaration Re Motion Picture Films—*Wiener v. California*, 404 U.S. 988 (December 14, 1971) (#71-443).

Exhibit D—Magazine 'My-O-My No. II'—*Wiener v. California*, 404 U.S. 988 (December 14, 1971) (#71-443).

Exhibit E—Magazine 'Hello'—*Weiner v. California*, 404 U.S. 988 (December 14, 1971) (#71-443).

Exhibit F—Magazine 'Psychedelic'—*Wiener v. California*, 404 U.S. 988 (December 14, 1971) (#71-443).

Exhibit G—Magazine 'Ballers #1'—*Wiener v. California*, 404 U.S. 988 (December 14, 1971) (#71-443).

Exhibit H—Magazine 'Wind 'n' Sassy'—*Wiener v. California*, 404 U.S. 988 (December 14, 1971) (#71-443).

"Defense exhibits offered and received below as comparable materials have been held to be not obscene as a matter of law within proper constitutional guidelines as enunciated in those Court decisions set forth in Argument and Authorities herein.

"Even though the materials, subject matter of the Indictment herein, are not *hard core pornography or obscene per se* (emphasis ours), Petitioner has nonetheless been charged with violation of Section 1461, that is the mailing of obscene matter. Petitioner was thereupon arrested and confined and thereafter necessarily incurred great legal expenses and other incidental out of pocket costs. In effect Petitioner, in an effort to follow the law as enunciated within the United States Code, Section 1461 of Title 18, and more specifically as enunciated in the myriad of Court decisions defining obscenity, undertook to avoid the mailing of any material even remotely equated to *hard core pornography or material obscene per se* (emphasis ours), and restricted his material mailed to that material which may by mere examination be found to be far within the limits of other similar materials held to be not obscene as a matter of law. In this good faith effort to comply with existing law and authoritative Court decisions, Petitioner was charged with violation of Section 1461. Petitioner respectfully submits that his arrest and confinement pursuant to Indictment and Warrant, and his subsequent incidental and necessary expenditures constitute a deprivation of his liberty and property without due process of law in violation of the Fifth Amendment to the United States Constitution.

"For those reasons herein stated it is respectfully urged that Section 1461 of Title 18 of the United States Code as applied constitutes a violation of the Due Process Clause under the Fifth Amendment to the United States Constitution.

"Further, Petitioner respectfully argues in brief that to permit application of Section 1461 in this case or any similar case to stand would be in the nature of a prior restraint upon freedom of expression. To permit plea and judgment to stand in a case involving materials most certainly comparable to other materials held to be not obscene as a matter of law and falling far within the limits of protected materials may reasonably deter another man from disseminating even such protected expression in the future. To permit, therefore, a Lower Court to maintain a plea of guilty to a charge under Section 1461 alleging the mailing of obscene material when as a matter of law the material is not obscene and when the Lower Court has before it not only such material but comparable materials held to be not obscene as a matter of law may be, it is respectfully urged, properly equated to a permissive application of Section 1461 in a manner wholly inconsistent with the guarantees of the First Amendment to the United States Constitution."

Conclusion.

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

GEORGE GROVE, JR.,
Attorney for Petitioner.

APPENDIX A.

Judgment and Opinion of the Court of Appeals.

In the United States Court of Appeals, for the Fifth Circuit.

United States of America, Plaintiff-Appellee, versus Robert E. Cote, Defendant-Appellant. No. 72-2417, Summary Calendar*.

Appeal from the United States District Court for the Northern District of Texas.

(October 11, 1973).

Before BELL, DYER and CLARK, Circuit Judges.

PER CURIAM: Pursuant to the order of the Supreme Court of the United States dated June 25, 1973 vacating our judgment and remanding this cause to this court, we have made an "independent constitutional judgment on the facts of the case as to whether the material is constitutionally protected", *Jacobellis v. Ohio,* 378 U.S. 184, 190, 84 S.Ct. 1676, 12 L.Ed.2d 793 (1964). Furthermore, we have tested the materials under both the standard for obscenity set out in *A Book Named John Cleland's Memoirs of a Woman of Pleasure v. Massachusetts,* 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed.2d 1 (1966), and the standard recently enunciated in *Miller v. California,* .... U.S. ...., ... S.Ct. ...., ... L.Ed.2d .... (1973). *See United States v. Thevis,* .... F.2d .... (5th Cir. 1973) [No. 71-2614, September ...., 1973]. The statute involved, 18 U.S.C. § 1461, has been the subject of authoritative judicial

*Rule 18, 5th Cir.; see *Isbell Enterprises, Inc. v. Citizens Casualty Co. of N.Y.,* 431 F.2d 409, Part I (5th Cir. 1970).

construction which renders its application constitutionally proper.

The materials for which Cote was prosecuted were magazines entitled: "Ups and Downs No. 4", "Duplex" and "Gemini"; a reel of movie film entitled: "Tri-sex"; and advertising materials thereabout.[1] We have tested each and all of these materials in the manner set out in *Thevis, supra*. If the test results of each of these articles were put into tabular form as was done in *Thevis*, every answer to every question would be yes.[2] Therefore, the convictions of Robert E. Cote upon his pleas of guilty are again

AFFIRMED.[3]

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[1]The following excerpt from Defendant's brief in this court describes the materials involved:

> That the picture books, films and advertisements charged in the indictment in the case at bar depict nude females in sexually suggestive poses and body movements is not in dispute. That there are occasionally a man and woman or two women in a picture (but without explicit sexual activity) is conceded. That the pictures and films are vulgar and monotonous is beyond argument. That no serious social message is communicated or intended by the pictures and films is evident. That no great dramatic talent or graphic artistry is demonstrated in the pictures and films is readily determinable upon a casual viewing. Tawdry? Very probably. Dull? Certainly. Sexually provocative? Perhaps to some; undoubtedly pathetic or laughable to others.

[2]Defendant contends that only hard-core pornography, which he defines as portrayal of explicit sexual acts in which the genitals are exposed, may be punished as criminally obscene. He urges that we follow the "actual performance" of the Supreme Court "as distinguished from its *rhetoric*." With the announcement of *Miller* and the companion cases of the same date, the Court's "performance" has taken a significant new turn. See *Thevis, supra*.

[3]Cote received concurrent two-year sentences upon each count.

Judgment.

United States Court of Appeals, for the Fifth Circuit.

United States of America, Plaintiff-Appellee, versus Robert E. Cote, Defendant-Appellant. October Term, 1972, No. 72-2417, D. C. Docket No. CR-4-904.

Appeal from the United States District Court for the Northern District of Texas.

Before BELL, DYER and CLARK, Circuit Judges.

WHEREAS, a judgment was entered by this court on December 6, 1972 affirming the convictions of appellant, Robert E. Cote;

WHEREAS, the Supreme Court of the United States entered an order on June 25, 1973 vacating our judgment and remanding this cause to this court for further proceedings;

ON FURTHER CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the convictions of Robert E. Cote upon his pleas of guilty are again affirmed.

October 11, 1973

Issued as Mandate:

United States Court of Appeals, for the Fifth Circuit.

United States of America, Plaintiff-Appellee, versus Robert E. Cote, Defendant-Appellant. No. 72-2417.

Filed: Nov. 19, 1973.

ON CONSIDERATION OF THE APPLICATION of the Appellant in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable Appellant to apply for and to obtain a writ

of certiorari from the Supreme Court of the United States. IT IS ORDERED that the issuance of the mandate of this Court in said cause be, and the same is stayed to and including December 9, 1973, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that certiorari petition has been filed.

IT IS FURTHER ORDERED that the Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/ Clark
UNITED STATES CIRCUIT JUDGE

APPENDIX B.

Judgment and Commitment of the Lower Court.

United States District Court for the Northern District of Texas at Forth Worth.

United States of America v. Robert E. Cote No. CR-4-904.

Filed: Jun. 9, 1972.

On this 9th day of June, 1972 came the attorney for the government and the defendant appeared in person and by employed counsel, George Grove, Jr.

It is Adjudged that the defendant upon his plea of guilty to Counts 1, 2, 3, and 4 of the Indictment has been convicted of the offense of Mailing of Obscene Material, in violation of Title 18, United States Code, Section 1461, as charged in Counts 1, 2, 3, and 4 of the Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of two (2) years on Count 1, two (2) years on Count 2, two (2) years on Count 3, and two (2) years on Count 4, said sentences to run concurrently.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ LEO BREWSTER
United States District Judge.

APPENDIX C.

Order Denying Petition for Rehearing.

In the United States Court of Appeals, for the Fifth Circuit.

United States of America, Plaintiff-Appellee, versus Robert E. Cote, Defendant-Appellant. No. 72-2417, Summary Calendar.*

Appeal from the United States District Court for the Northern District of Texas.

ON PETITION FOR REHEARING

(November 9, 1973).

Before BELL, DYER and CLARK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

APPENDIX D.

Order of Denial on Pretrial Motion to Dismiss.

In the United States District Court, for the Northern District of Texas, Fort Worth Division.

United States of America vs. Richard A. Cote, et al. CR. 4-904.

ORDER ON MOTION TO DISMISS

The defendants' motion to dismiss has been duly presented to the Court and a hearing held after proper notice, with each of the defendants and their attorneys, and an Assistant United States Attorney present and participating. After considering the motion, the Court has come to the conclusion that it should be overruled. It is accordingly so ordered.

Signed, March 3, 1972.

/s/ Leo Brewster
JUDGE

APPENDIX E.

Order Denying Petitions for Writ of Mandamus and Writ of Prohibition.

In the United States Court of Appeals, for the Fifth Circuit.

Richard A. Cote, et al., Petitioners, versus Leo Brewster, U.S. District Judge, Northern District at Texas, Respondent. No. 72-1987.

Appeal from the United States District Court for the Northern District of Texas.

Before THORNBERRY, COLEMAN and INGRAHAM, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the petition for writ of mandamus, filed in the above styled and numbered cause, is hereby DENIED.

IT IS ORDERED that the separate petition for writ of prohibition, is hereby DENIED.

APPENDIX F.

Constitutional and Statutory Provisions Involved.

1. The pertinent provisions of the First Amendment to the United States Constitution are:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ."

2. The pertinent provisions of the Fifth Amendment to the United States Constitution are:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law; . . ."

3. The pertinent provisions of Section 1461 of Title 18 of the United States Code, at the time the alleged offense was committed, are:

> "Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and— . . .
>
> "Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, article, or things may be obtained or made, . . .
>
> "Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.
>
> "Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person

to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter. . . ."

APPENDIX G.

Opinion of Appeals Court in the Case Entitled United States of America vs. Thevis.

In the United States Court of Appeals, for the Fifth Circuit.

United States of America, Plaintiff-Appellee, versus Michael G. Thevis and Peachtree News Company, Inc., Defendants-Appellants. No. 71-2614.

Appeal from the United States District Court for the Middle District of Florida.

(September 12, 1973).

Before BROWN, Chief Judge, BELL and SIMPSON, Circuit Judges.

BELL, Circuit Judge: Appellants Thevis and Peachtree News Company, Inc. were charged in a twelve-count indictment with transporting obscene material by common carrier in interstate commerce, in violation of 18 USCA, § 1462.[1] Jury trial was waived. The subject matter of each count was a particular magazine and appellants were convicted on each of the counts. The district court found that the material in question, i.e., each magazine, was obscene under

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[1]18 USCA § 1462 (1966):

Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce—

(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character; . . .

shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense. . . .

the three-pronged test of *Memoirs.*[1] A term of six months imprisonment and five years probation was imposed on Thevis under each count, with the sentences to be served concurrently. In addition, fines were imposed on each defendant with respect to each count. This appeal followed. We affirm with respect to six counts and reverse as to six.

In urging reversal, appellants originally presented five arguments to this court. These were: (1) that the constitutional test for obscenity must focus on whether "pandering" is involved in the distribution of challenged material, and on whether the material is distributed to minors or unwilling adults, cf. *Redrup v. New York,* 1967, 386 U.S. 767, 87 S.Ct. 1414, 18 L.Ed.2d 515; (2) that the indictment was unconstitutionally vague in that it merely tracked the statutory language without specifying the elements constituting "obscenity"; (3) that it was necessary for the government to prove that the appellants had transported the magazines knowing that they were obscene in the constitutional sense; (4) that 18 USCA, § 1462 is void for overbreadth in that it reaches transportation of obscene material for private as well as commercial use; and (5) that the prosecution failed to prove by competent evidence that the magazine fell outside the protection of the *Memoirs* standard. We understand appellants' fifth assignment of error to include two distinguishable elements: first, that the prosecution failed to produce sufficient expert testimony; and second, that the evidence, of whatever nature, was insufficient to support the lower court's finding on the issue of obscenity *vel non.* We will treat these two elements as separate assignments of error.

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[1] *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts,* 1966, 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed.2d 1.

Subsequent to oral argument, the Supreme Court announced five opinions in which a majority of that Court agreed on concrete guidelines to isolate materials depicting or describing "patently offensive 'hard core' sexual conduct" from expression protected by the First Amendment. *Miller v. California,* 1973, ... U.S. ....., ... S.Ct. ....., 37 L.Ed. 2d 419, 432; *Paris Adult Theatre I v. Slaton,* 1973, ... U.S. ....., ..., S.Ct. ....., 37 L.Ed.2d 446; *United States v. Orito,* 1973, ... U.S. ....., ... S.Ct. ....., 37 L. Ed.2d 513; *Kaplan v. California,* 1973, ... U.S. ....., ... S.Ct. ....., 37 L.Ed. 2d 492; *12 200 Ft. Reels of Super 8 mm Film,* 1973, ... U.S. ..... ,..... S.Ct. ....., 37 L.Ed.2d 500.

In light of these opinions, appellant has filed a supplemental brief urging that the *Memoirs* standard can no longer be used for testing obscenity. Further, in this brief it is argued that the *Miller* standard is also inapplicable, for two reasons: (1) that application of the new standard would be violative of the Ex Post Facto clause of Article I, § 9, United States Constitution; and (2) that in any case the material in question would be protected under *Miller* because 18 USCA, §1462, as written or authoritatively construed, does not specifically define that sexual conduct whose depiction or description is thereby regulated. In essence, appellants are contending, on the authority of *Miller,* that the Supreme Court has eliminated all obscenity laws that would have been otherwise applicable to transactions occurring prior to June 21, 1973, and that the Court has also eliminated all laws controlling obscenity after that date, save as legislatures enact or courts construe statutes to meet the *Miller* requirements. In sum, claim the appellants, we are without power to

test the materials for obscenity under any standard. We reject this broad contention. We do not perceive that the Supreme Court, either deliberately or unwittingly, has stripped the nation of laws against obscenity in any such manner.

For reasons to be discussed in Part II of this opinion, we hold that the twelve magazines are to be tested for obscenity under both standards, with the appellants in every instance to receive the benefit of the most favorable standard. We reserve the issue of obscenity *vel non*, under both standards, for Part III. In Part I we shall consider appellants' first five original assignments of error.

I.

Appellants' first assignment of error is that the materials in question should not be tested under a standard as restrictive of pronography[3] as *Memoirs*. Rather they urge a standard arguably suggested in *Redrup v. New York*, supra, requiring for a finding of obscenity that the materials be distributed to non-consenting adults, to juveniles, or generally in a "pandering" manner. We consider this argument to have been completely foreclosed by the Supreme Court's statement, in *Miller*, that the *Memoirs* standard was correctly viewed as the limit on state prosecution prior to *Miller*, ... U.S. at ...., 37 L.Ed.2d at 435. We also find entirely spurious the argument that there was such

[3] "Pornography" derives from the Greek (*porne'*, harlot, and *graphos*, writing). It now means "1: a description of prostitutes or prostitution. 2: a depiction (as in writing or painting) or licentiousness or lewdness: a portrayal of erotic behavior designed to cause sexual excitement." Webster's New International Dictionary (Unabridged, 3d Ed., 1969). Whether or not the material in question is obscene, it is pornography. This latter term connotes no legal conclusions or consequences.

a marked departure in *Redrup* from the basic assumption of *Memoirs*, that the nature of the material and not the manner of its distribution is determinative of obscenity. In the *Redrup* per curiam opinion, the Court specifically declined to consider the effect of the characteristics of the method of distributing pornographic materials. Finally, we note that the origin of the "pandering" concept is *Ginzburg v. United States*, 1966, 383 U.S. 463, 86 S.Ct. 942, 16 L.Ed.2d 31, and that pandering in that case was specifically treated merely as an indicator of whether the material itself appealed to prurient interests and was utterly without redeeming social value. See *Ginzburg*, 383 U.S. at 467-76.

Appellants' second argument is that the indictment, which tracked the wording of 18 USCA, § 1462, must be dismissed for failure to specify the elements of obscenity. We do not agree. The general rule, stated by this court, is that:

> "An indictment which follows the language of the statute is ordinarily sufficient unless the statute omits an essential element of the offense."

United States v. Farabee, 5 Cir., 1969, 411 F.2d 1210, 1211; *Downing v. United States*, 5 Cir., 1965, 348 F. 2d 594, 599. See also *Esperti v. United States*, 5 Cir. 1969, 406 F.2d 148; *Bland v. United States*, 5 Cir., 1962, 299 F.2d 105. The statute here does not omit any essential element of the offense for which appellants have been convicted. The term "obscene" as used in the statute is a legal term of art, not merely a generic or descriptive term. The term has been the subject of much explication in Supreme Court opinions, and in particular has been defined in *Roth*[4] and *Memoirs*.

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[4] *Roth v. United States*, 1957, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498.

Further, in *Roth* the Court held that the words used in 18 USCA, § 1462 are sufficiently precise to avoid the due process vice of vagueness.[5]

Appellants' third contention deals with the scienter necessary for conviction under 18 USCA, § 1462. Appellants claim that it is necessary for the government to prove not merely knowledge of the nature of the materials placed in interstate commerce, but also to prove that appellants were aware that the materials were legally obscene.

Appellants base this argument on *Smith v. California*, 1959, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205. In *Smith*, the Supreme Court reversed the conviction of a book store proprietor under an ordinance that imposed absolute criminal liability on any party possessing obscene matter for sale. The Court held that scienter, of some nature, was a necessary element where First Amendment Rights were concerned. However, the Court pointedly did not pass on the nature of the requisite mental element. Apparently the Court did not disturb its holding in *Rosen v. United States*, 1896, 161 U.S. 29, 40 L.Ed. 606, that knowledge or notice of the contents of obscene material is sufficient and that it need not be shown that the material was, in the opinion of the accused, legally obscene. A number of lower courts have followed *Rosen* in recent years: *United States v. West Coast News Company*, 6 Cir., 1966, 357 F.2d 855, *rev'd on other grounds, Aday v. United States*, 1967, 388 U.S. 447, 87 S.Ct. 2095, 18 L.Ed.2d 1309; *Schindler v. United States*, 9 Cir., 1953, 208 F.

[5]The sufficiency of an indictment tracking the words of 18 USCA, § 1462 was challenged in *United States v. Luros*, N.D. Iowa, 1965, 243 F.Supp. 160, *rev'd on other grounds*, 8 Cir., 1968, 389 F.2d 200. That court reached a conclusion identical to ours. *Id.* at 166-67.

2d 289. See also *Kahm v. United States*, 5 Cir., 1962, 300 F.2d 78. We hold that the government, by proving that the appellants knew the nature of the materials they put in interstate commerce, has met its burden of proving scienter.

The appellants' fourth contention is that the statute under which they have been prosecuted is overbroad because it fails to distinguish between transportation of obscene materials for private use and that for commercial distribution. This argument arises from *Stanley v. Georgia*, 1969, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed. 2d 542, which established that individuals may possess obscene materials in the privacy of their own homes; and it assumes that there is a correlative right to transport and receive such material for private use. Whatever validity, if any, this reasoning may ever have had was badly eroded by *United States v. Thirty-Seven Photographs*, 1971, 402 U.S. 363, 91 S.Ct. 1400, 28 L.Ed.2d 822, and *United States v. Reidel*, 1971, 402 U.S. 351, 91 S.Ct. 1400, 28 L.Ed.2d 813. The argument has now been absolutely foreclosed by *United States v. Orito*, supra. In *Orito* the Court ruled against a defendant who made precisely the same claim raised here.

The first element of appellants' fifth contention is that their conviction is precluded by the government's failure to use sufficient expert testimony on the issues of prurient appeal, community standards, and redeeming social value. We held in *United States v. Groner*, 1973, ... F.2d ..... (En banc) [No. 71-1091, Slip Opinion dated May 22, 1973], that expert testimony on the part of the prosecution is not necessary in cases where the materials themselves are available for inspection by the finder of fact. That we were correct

in this opinion was made clear in *Paris Adult Theatre I v. Slaton*, supra, ... U.S. at ....., 37 L.Ed.2d at 456. See also *Kaplan v. California*, supra, ... U.S. at ....., 37 L.Ed.2d at 498.

II.

We now turn to the issues raised in appellants' supplemental brief, dealing with whether *Miller* precludes testing for obscenity under any standard.

In *Miller* the Court states that the constitutional test for obscenity is whether:

"(a) [T]he average person, applying 'contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest," (citations omitted)

"(b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law," and

"(c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

In *Orito*, supra, and *12 200-Ft. Reels*, supra, the Court made clear that this standard also applies to prosecutions under federal statutes. It might be noted that *Miller* relaxes the government's burden by eliminating the *Memoirs* requirement that the material be proven "utterly without redeeming social value", and by the Court's clarification that "community standards" does not refer to a nationwide community. On the other hand, in order carefully to limit regulation of pornographic materials, so as to avoid First Amendment incursions, the *Miller* standard requires that regulatory statutes define specific conduct to whose depic-

tion or description they apply. However, the Court makes clear that the statutory requirement can be satisfied by a judicial gloss, and that statutes as broad as 18 USCA, § 1462 are subject to such construction. See *12 200-Ft. Reels*, supra, fn. 7 (discussed and quoted at p. 13 infra).

Having thus stated the standards governing control of pornography, and having also resolved other points of uncertainty,* the Supreme Court in each case, and in some 60 other cases dealt with summarily or by per curiam decision on July 25, 1973, vacated the judgments and remanded for further proceedings not inconsistent with the *Miller* series of opinions.

Appellants would have us conclude that the Court's wholesale vacation and remand of obscenity cases, and especially that of *Kaplan v. California*, supra, (in which the Court agreed that the material was obscene under the *Memoirs* standard), established that the *Memoirs* standard could not have been used as a basis for conviction in pending cases.

We decline to read so much into *Miller*. Rather, we conclude that by indiscriminately vacating and remanding these cases, the Supreme Court declared that all obscenity cases which had not reached final adjudication should be re-examined in light of its clarification by previous standards and its declaration of new standards. We do not read this as precluding our application of the *Memoirs* standard to materials involved in transactions occurring in 1970. We base this conclusion on several observations. For one, we note that the Supreme Court in *Miller* stated specifically that

*Some of the auxiliary rulings were noted above when this court dealt with various of the appellants' original arguments for reversal. See Part I of this opinion.

Memoirs was "correctly regarded at the time of trial as limiting state prosecution under controlling case law." ..... U.S. at ....., 37 L.Ed.2d at 435.

Further, at no point did the Court indicate that *Miller's* clarification and modification of *Memoirs* was the result of *Memoirs* permitting unconstitutional infringement on efforts to distribute pornography. Rather, the Court was dissatisfied with *Memoirs* because it imposed greater burdens on the regulation of such materials than was demanded by the Constitution. Thus the Court criticized the "utterly without redeeming social value" requirement as being a "burden virtually impossible to discharge under our criminal standards of proof." *Miller*, ... U.S. at ....., 37 L. Ed. 2d at 429, and it stated that "it is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City". *Id.*, at ....., 37 L.Ed.2d at 435. We are unable to conclude from the Court's wholesale remand of these cases, without more, that the Court, concerned as it was for strengthening the power to regulate pornography, chose gratuitously to eliminate constitutionally-valid law that would otherwise be available in prosecuting pending obscenity cases.

However, we do believe it to be our duty, under the *Miller* remands and in view of the care with which the judiciary must protect First Amendment rights, to assure that no one is convicted under earlier extant standards if they are more restrictive of pornography than those in *Miller*. Thus when we make, as we are required to do, an "independent constitutional judgment on the facts of the case as to whether the material is constitutionally protected", *Jacobellis v. Ohio*,

1964, 378 U.S. 184, 190, 84 S.Ct. 1676, 12 L.Ed.2d 793; *United States v. Groner*, 5 Cir., 1973, supra, we shall consider both the *Miller* and *Memoirs* definitions of obscenity. Any count based on a magazine which is not obscene under both of these standards is due to be dismissed.

Our dual test approach is out of an abundance of caution based on the surmise that the Supreme Court, by vacating and remanding the entire group of obscenity cases, indicated that defendants in pending prosecutions were entitled to the benefit, if any, of the new standards. That our decision in this case must so accommodate the new standard is made evident by *Miller v. United States*, 1973, ... U.S. ....., ... S.Ct. ....., 37 L.Ed.2d 1022. There the Court vacated and remanded a federal conviction for reconsideration in light of the *Miller* series of opinions. The federal conviction was under the *Memoirs* standard and the very statute here involved, and against a defendant who raised on appeal contentions similar to those made by the appellants here. See *Miller v. United States*, 9 Cir., 1970, 431 F.2d 655.

Therefore, before we consider the question of obscenity, *vel non*, and because we do apply the *Miller* standard, we must address ourselves to the question whether 18 USCA, § 1462 can satisfy the *Millen* requirement that the applicable statute specifically define sexual conduct whose depiction or description is thereby restricted. This assumes, of course, that the Supreme Court intended for appellants to have the benefit of the *Miller* standard.[7]

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[7]We do not assume, given ex post facto considerations, that the Supreme Court intended to impose any detriment ensuing from the *Miller* standards on appellants.

The statute under which the appellants were indicted proscribes interstate transportation of "obscene, lewd, lascivious, of filthy" materials. On its face, this statutory terminology does not contain the specifics required by *Miller*. The same, of course, might have been said of the statute while *Memoirs* controlled the definition of obscenity. The difference is that *Miller* requires that elements of the definition be a part of the statute. This requirement may be met, however, according to *Miller*, by authoritative judicial construction. Further, in *12 200-Ft. Reels*, supra, at fn. 7, the Court states that it is "prepared to construe such [federal statutory] terms as limiting regulated material to patently offensive representations or descriptions of that specific 'hard-core' sexual conduct given as examples in *Miller*. . . ."[8] We believe that this answers the question and that the definition of *Miller* is a gloss properly added to § 1462. The effect is to substitute the *Miller* definition of "obscene" for the *Memoirs* definition. On this basis we proceed to an examination of the materials which underlie the indictment.

III.

In making our independent constitutional judgment under *Jacobellis v. Ohio, supra*, as to whether the materials in question are constitutionally protected, we have inspected the magazines in question and have applied both the *Memoirs* and *Miller* standards. Our conclusions on each element of both tests as to each magazine are contained in Table I.

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[8]These examples are:

"(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

"(b) Patently offensive representations or descriptions of masturbation, excretary functions, and lewd exhibitions of the genitals."

Miller, ... U.S. at ....., 37 L.Ed.2d at 431.

TABLE I

	Memoirs			*Miller*		
Magazine Titles	*(a) Dominant theme, taken as a whole, appears to a prurient interest in sex*	*(b) Patently offensive because it affronts contemporary community standards relating to description or representation of sexual matters*	*(c) Utterly without redeeming social value*	*(a) The average person, applying contemporary community standards, would find that the work taken as a whole appeals to the prurient interest*	*(b) Patently offensive depiction or description of sexual conduct specifically defined by applicable statute*	*(c) Taken as a whole, lacks serious literary, artistic, political or scientific value*
Boys and Their Male Lovers	Yes	Yes	No	Yes	Yes	Yes
Duo	Yes	Yes	Yes	Yes	Yes	Yes
Domino	Yes	Yes	Yes	Yes	Yes	Yes
Love Knot	Yes	Yes	Yes	Yes	Yes	Yes
Wanton	Yes	Yes	Yes	Yes	Yes	Yes
My Boys	Yes	Yes	Yes	Yes	Yes	Yes
In & Its Nice	Yes	Yes	Yes	Yes	Yes	Yes
Girlfriends	Yes	Yes	No	Yes	Yes	Yes
Pussy Willow	Yes	Yes	No	Yes	Yes	Yes
Arcadia	Yes	Yes	No	Yes	Yes	Yes
Teenage Jaybirds	Yes	Yes	No	Yes	Yes	Yes
Cloud 9	Yes	Yes	No	Yes	Yes	Yes

In summary, we have concluded that all of the magazines are obscene under *Miller*, but that six are protected by the *Memoirs* requirement that they be utterly without redeeming social value. We have distinguished these six from the remainder on the basis of their significant content of literary matter, including short stories of at least arguable merit as well as discussions of lesbiansim, homosexuality, nudity, censorship, photography, marital sexual problems, and the nude in fine art. The inclusion of this literary matter in significant proportions precludes a finding, in our judgment, that the six magazines are "utterly without redeeming social value." The issue as to these six is close, due to the numerous pornographic pictures included with the literary matter. Indeed, the pictures in each instance are the principal content of the magazines and would, standing alone be found obscene.

Since we have ruled that appellants are to receive any protection provided by either applicable standard, their convictions on the six counts based on magazines we find to be protected by *Memoirs* must be reversed. The judgment of conviction as to the other six counts is affirmed.

AFFIRMED in part; REVERSED in part.